

59. We also propose to modify the requirement in Section 1.733 of the rules that the staff memorialize oral rulings made in status conferences.¹⁰² We propose that, within 24 hours after a status conference, the parties in attendance, unless otherwise directed, must submit a joint proposed order memorializing the oral rulings made during the conference to the Commission. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. Parties may, but are not required to, tape record the Commission's summary of its oral rulings. Alternatively, parties may use a stenographer to transcribe the oral presentations and exchanges between and among the participating parties, insofar as such communications are not "off-the-record." The cost of such stenographer will be shared equally by the parties. We seek comment on these proposals and any alternative proposals that would facilitate the prompt issuance and memorialization of staff rulings at status conferences.

G. Cease, Cease-and-Desist Orders and Other Forms of Interim Relief

60. Our goal in proposing procedural rules for requests for cease-and-desist orders and other forms of interim relief is to expedite the staff's review and disposition of such requests in Section 208 complaint proceedings. As an initial matter, we note that Title III of the Act authorizes the Commission to issue a cease-and-desist order for violation of the Act and certain provisions in Title 18 of the United States Code.¹⁰³ Section 312(c) requires the Commission to hold a show cause hearing prior to issuing any cease-and-desist order pursuant to Section 312(b) and Section 312(d) assigns the burden of proceeding with the introduction of evidence and the burden of proof in such proceedings on the Commission.¹⁰⁴ The sole provision in Title II of the

¹⁰² See 47 C.F.R. § 1.733(c).

¹⁰³ Section 312(b) states that:

Where any person ... (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

47 U.S.C. § 312(b).

¹⁰⁴ Section 312(c) states that:

Before ... issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why ... a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is

Act that specifically contemplates the use of Section 312 hearings with respect to cease-and-desist orders is Section 224 regarding the regulation of pole attachments.¹⁰⁵ In contrast, Section 274 of the Act, for example, which specifically authorizes the Commission to issue cease-and-desist orders, is silent as to the use of Section 312 hearings. Because Sections 208 and 274 do not cross-reference to Section 312, and particularly in light of the strict resolution deadlines contained in the 1996 Act, we tentatively conclude that Congress did not intend Section 312 hearings to apply in Section 208 and related complaint proceedings under Title II of the Act, even if they lead to cease-and-desist orders. We seek comment on this tentative conclusion.

61. We propose to amend our rules to delineate the legal and evidentiary standards necessary for obtaining cease or cease-and-desist orders pursuant to Title II of the Act¹⁰⁶ and other forms of interim relief in Section 208 formal complaint cases. Generally, such relief would be based on specific allegations and supporting documentation provided in the complaint. A complaint failing to address these minimum legal and evidentiary standards would provide no basis upon which interim relief could be granted. We believe that creating minimum legal and evidentiary standards is necessary to expedite the issuance of cease or cease-and-desist orders within the 1996 Act's deadlines and to create more certainty regarding the legal and factual basis for granting interim relief. We seek comment on this proposal as well as on the specific standards that should apply to requests for cease or cease-and-desist orders and other forms of interim relief. We note that when a court issues certain types of interim relief, such as a temporary restraining order, it generally requires that the plaintiff demonstrate four factors: (1)

involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that a ... cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

47 U.S.C. § 312(c).

Section 312(d) states that:

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

47 U.S.C. § 312(d).

¹⁰⁵ Section 224 provides that "the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III..." 47 U.S.C. § 224(b)(1).

¹⁰⁶ Cease-and-desist orders regarding BOC violations of electronic publishing requirements may also be obtained independently of a Section 208 complaint proceeding pursuant to Section 274. See 47 U.S.C. § 274(e)(2).

likelihood of success on the merits; (2) the threat of irreparable harm absent the injunction; (3) no substantial injury to other parties; and (4) the furtherance of the public interest.¹⁰⁷ Courts have also traditionally required the posting of bond in some cases prior to granting interim relief.¹⁰⁸ We seek comment on the applicability of these and other traditional court mechanisms to the Commission's issuance of cease orders, cease-and-desist orders, and other interim relief.

62. We note that Sections 260 and 275 regarding LEC provision of telemessaging service and provision of alarm monitoring service, respectively, require the Commission to issue, within 60 days of filing upon an "appropriate showing" of a violation that resulted in "material financial harm," an order directing the LEC "to cease engaging" in such violation "pending [a] final determination" by the Commission.¹⁰⁹ In addition, Section 274, regarding BOC provision of electronic publishing, authorizes the Commission to issue cease-and-desist orders for violations of this section; however, it contains no deadline for issuing such orders; nor does it predicate issuance of such orders on a showing of material financial harm.¹¹⁰ We seek comment on whether separate or specialized procedures are necessary for processing requests for cease or cease-and-desist orders under Sections 260, 274 and 275. In our Sections 260, 274, 275 NPRM, we sought comment on what type of showing would constitute an "appropriate showing" for the Commission to issue an order to "cease engaging" to a LEC pursuant to Sections 260(b) and 275(c). We asked whether it would be sufficient for the complainant to establish a *prima facie* showing of discrimination.¹¹¹ In addition, we also sought comment on the meaning of an order "to cease engaging" under Sections 260(b) and 275(c). In particular, we asked whether these sections give the Commission the authority to issue a cease and desist order similar to the order contemplated in Section 274(e)(2) and, if so, whether the showing required under Section 274

¹⁰⁷ See, e.g., Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

¹⁰⁸ See, e.g., Fed. R. Civ. P. 65(c), stating that:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

¹⁰⁹ 47 U.S.C. §§ 260(b), 275(c).

¹¹⁰ 47 U.S.C. § 274(e)(2).

¹¹¹ See Sections 260, 274, 275 NPRM, para. 84:

[W]e seek comment on what type of showing constitutes an "appropriate showing" for the Commission to issue the LEC an order "to cease engaging" in an alleged violation of sections 260 or 275. Would it be enough for the complainant to establish a *prima facie* showing of discrimination?

differs in any material respect.¹¹² Few parties commented on these issues in response to the Sections 260, 274, 275 NPRM and, therefore, we find it necessary to seek additional comment on these important issues here. We emphasize that all comments pertaining to enforcement issues in the Sections 260, 274, 275 rulemaking proceeding are incorporated by reference.¹¹³ Interested parties are encouraged to address the need, if any, for separate or specialized standards and procedures for cease orders pursuant to Sections 260 and 275 and cease-and-desist orders pursuant to Section 274. Commenters should address in particular the meaning of the terms "material financial harm" as used in Sections 260 and 275. Should a showing of material financial harm also be required in order to obtain a cease-and-desist order under Section 274? What level of proof is required to establish such material financial harm in the context of a Section 208 complaint proceeding?

H. Damages

63. Our goal in the following proposals is to eliminate or minimize the delay that is often inherent in resolving damages issues. Our experience has been that the damages phase of the formal complaint process is often cumbersome and protracted largely due to the scope and magnitude of the discovery typically requested by complainants and defendants to substantiate or refute damages claims. The complaint resolution deadlines mandated by the 1996 Act substantially affect the Commission's ability to resolve both liability and damages issues within the same timeframes.

64. One option would be to permit the complainant to bifurcate liability and damages issues,¹¹⁴ especially in light of the express resolution deadlines in Sections 208, 260, 271 and 275 of the Act. In many instances, complainants have effectively bifurcated their liability and damages claims by specifically reserving the right to file a supplemental complaint for damages after liability has been determined. Section 1.722(b) of our current rules specifically authorizes such action.¹¹⁵ Our supplemental complaint provisions have proven to be useful tools. Our

¹¹² See id.:

We also seek comment on the meaning of an order "to cease engaging" under sections 260(b) and 275(c). Do these sections give the Commission authority to issue a cease and desist order similar to the one in section 274(e)(2)? If so, parties should comment on whether the showing under section 274 differs in any material respect from the showing required under sections 260 and 275.

¹¹³ See Section 260, 274, 275 NPRM, paras. 78-84.

¹¹⁴ See, e.g., Appendix A, § 1.722(c).

¹¹⁵ Section 1.722(b) states that:

Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint based upon

experience handling formal complaints has shown that a significant amount of the parties' discovery efforts often center around developing facts that would prove or disprove injury or damages incurred as a consequence of a violation of the Act or Commission requirements. The time and effort expended by the parties and the Commission on discovery related to damages claims is effectively wasted if no violation or liability is found on the part of the defendant. Furthermore, the time constraints mandated by certain statutory complaint provisions allow very little time or opportunity for complainants to present evidentiary arguments sufficient to establish both a violation of the Act and a proper measure of damages incurred as a consequence of such violation within such deadlines. Where a complainant voluntarily bifurcates a complaint proceeding, the Commission would defer adjudication of all damages issues until after a finding of liability. This approach would enable the Commission to make a liability finding within the statutory deadline and still preserve the complainant's right to a damage award. We recognize that, while bifurcation results in a faster complaint proceeding if no liability is found, the overall proceeding can be significantly longer if liability is found and damages are decided in a separate, second proceeding. In light of the strict time deadlines in Sections 208, 260, 271 and 275, however, we would expect that complainants would avail themselves of the supplemental complaint bifurcation approach in most instances to avoid the possibility that the time deadlines may not provide them with enough time to develop sufficiently their damages claims.

65. We believe that bifurcation through the voluntary supplemental complaint process would be particularly appropriate in those cases in which a complainant seeks both prospective relief and damages for a defendant carrier's violation of the Act or a Commission rule or order. For example, we believe that a decision by the Commission requiring a defendant carrier to terminate a particular practice or to provide service to a complainant under more reasonable terms

a finding of the Commission in the original proceeding. *Provided that:*

(1) If recovery of damages or overcharges is first sought by supplemental complaint, such supplemental complaint must be filed within, and recovery is limited to, the statutory periods of limitations contained in section 415 of the Communications Act;

(2) A claim for recovery of damages contained in a supplemental complaint based on a finding of the Commission in the original proceeding which meets the requirements of paragraph (a) of this section shall relate back to the filing date of the original formal complaint if:

(i) The original complaint clearly and unequivocally requests the recovery of damages (even if the precise amount and other specific details are unknown), and

(ii) Such supplemental complaint is filed no later than 60 days after public notice (as defined in § 1.4(b) of the rules) of a decision on the merits of the original complaint.

and conditions would constitute a final, appealable order, as would a decision denying a complainant such relief.¹¹⁶ This would be the case even if there remained issues of damages to be resolved as a result of the complainant's decision to file a supplemental complaint. Bifurcation would enable the parties and the Commission to focus efforts to ensure that important service provisioning and other marketplace issues are resolved expeditiously, consistent with the pro-competitive goals and objectives underlying the complaint resolution deadlines contained in the 1996 Act. A complainant would be free to file a supplemental complaint for damages as provided under Section 1.722 of the rules and both the complainant and defendant carrier would have a full opportunity to present and defend against damages claims in such supplemental proceedings. We invite interested parties to comment on the relative benefits to be gained by bifurcating liability and damages issues in Section 208 proceedings through complainants' voluntary use of the supplemental complaint process and to identify bifurcation standards that might help ensure that both liability and damages issues are fully resolved within the earliest practicable timeframe. We also request comment on whether the Commission legally may and should require bifurcation in certain circumstances.

66. We also propose to require that any complaint seeking an award of damages contain a detailed computation for damages,¹¹⁷ analogous to the requirement in the Federal Rules of Civil Procedure for initial disclosures.¹¹⁸ Under this approach, a complainant must submit a computation for any category of damages claimed, as well as identification of all documents or

¹¹⁶ This is in contrast to Mountain States in which the sole relief at issue was damages based on historical rates that the Commission had found to be unlawful under the Act. In Mountain States, the complainant claimed injury resulting from access rates charged by the LECs. The Commission issued an order holding the LECs liable but reserved the damages issue for later proceedings. Because the Commission had yet to determine whether the complainants were entitled to any relief (in this case damages) as a consequence of the violations, the Court, in an unpublished decision that therefore has no precedential effect, held that the Commission's decision had no final effect for purposes of judicial review. Mountain States Telephone & Telegraph v. FCC, 1991 WL 268824, at **2 (10th Cir. Dec. 13, 1991). In any event, if a complainant's initial complaint covered only a request for a finding of liability and did not request any damages relief, we believe that a decision within the statutory time deadline would constitute compliance with that deadline even if a court were to conclude that, because no damages relief was ordered, judicial review was unavailable until such damages relief was ordered pursuant to a subsequent adjudication on the complainant's supplemental complaint for damages.

¹¹⁷ See Appendix A, § 1.722(c).

¹¹⁸ The rule states that:

[A] party shall, without a waiting [sic] a discovery request, provide to other parties ... a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rules 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered...

material, not privileged or protected from disclosure, on which such computation is based.¹¹⁹ We would expect any computation to identify and describe clearly and concisely the information and assumptions underlying the computations. For example, in cases in which a complainant is challenging the reasonableness of charges or rate levels applied by a carrier to particular services taken by the complainant, the complainant's computations must clearly identify the precise nature of the service taken and applicable charges broken down by such factors as minutes of use, traffic mileage and volume, as well as any applicable discounts or other adjustment factors. We further propose that the Commission's adjudication of damages end with a determination about the sufficiency of the computation submitted by the complainant rather than a finding as to the exact amount of damages, if any, owed to the complainant. A similar approach is used in complaints dealing with pole attachments.¹²⁰ The advantage of this approach is that the Commission would be spared the detailed and time-consuming investigation of the facts necessary to establish an exact amount of damages, while still issuing a ruling that would allow the parties themselves to compute properly the amount of damages. We seek comment on the above proposals and encourage commenters to submit alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.

67. In conjunction with our proposal to permit complainants to file supplemental complaints and thereby bifurcate liability and damages issues, we propose to establish, following a finding of liability, a limited period during which the parties could engage in settlement negotiations or submit their damage claims to voluntary alternative dispute resolution mechanisms in lieu of further proceedings before the Commission. There are several advantages with this approach. The Commission's time would be more productively spent adjudicating solely liability issues. Any mediator or arbitrator chosen would not be restricted by our ex parte rules in gathering relevant information. The mediator or arbitrator could then take into account factors that may be relevant to offset damages.

68. Also in conjunction with our bifurcation proposal, we ask interested parties to comment on the benefits, if any, of referring damages issues to an administrative law judge for decision once liability for damages has been determined by the Commission or if the parties agree to mediation by an administrative law judge. The administrative law judges could, for example, act as "Special Masters" for purposes of receiving and reviewing evidence necessary to determine the amounts, if any, a complainant is entitled to recover from a defendant carrier for harm suffered in consequence of a violation determined by the Commission in the liability phase of the proceeding.¹²¹ Under this proposal, referral of a damages claim to an administrative law judge would be at the discretion of the Commission or the staff pursuant to delegated authority, depending on the particular facts and circumstances involved. Nothing in this proposal, however,

¹¹⁹ We note that in a proceeding which has been bifurcated into separate liability and damages phases, a computation of damages need not be provided until a supplemental complaint for damages has been filed.

¹²⁰ See generally, 47 C.F.R. § 1.1404(g).

¹²¹ See Appendix A, § 1.722(d).

would preclude the parties from electing voluntary dispute resolution mechanisms in lieu of proceedings at the Commission. We also encourage commenters to submit alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.

69. We also propose in such bifurcated proceedings, after a finding of liability, to give the Commission discretion to require defendants to place a sum of money in an interest-bearing escrow account, to cover part or all of the damages for which they may be found liable.¹²² This measure would be implemented under standards similar to those used for determining whether a preliminary injunction is appropriate, *e.g.*, likelihood of success on the merits, irreparable harm, etc.¹²³ The requirement should provide complainants with some assurance that any judgment ultimately determined by the Commission can be readily collected. Under this approach, the Commission would not administer the escrow account. We seek comment on this and any additional proposals that may facilitate and expedite the resolution of damages claims.

I. Cross-Complaints and Counterclaims

70. The current rule regarding counterclaims and cross-complaints is permissive, stating that counterclaims and cross-complaints "*may* be filed by a defendant with its answer."¹²⁴ To meet our new statutory deadlines, as well as impose greater discipline on the complaint process, we propose to allow compulsory counterclaims, those arising out of the same transaction or occurrence that is the subject matter of the opposing party's claim, only if the defendant files them concurrently with the answer. If a defendant fails to file such a compulsory counterclaim with its answer, it will be barred. A defendant may, but is not required to, file permissive counterclaims (those not arising out of the same transaction or occurrence) against the complainant. In addition, a defendant may, but is not required to, file cross-claims that arise out of the same transaction against co-parties. To the extent that the defendant elects to file such permissive counterclaims and cross-claims, it must file these pleadings concurrently with its answer. The defendant always has the option of filing any barred permissive counterclaims or cross-claims in a separate proceeding, provided that the statute of limitations has not run. Furthermore, if the parties decide to utilize ADR mechanisms to resolve any damages issue if liability is found, the defendant could then bring in the issues of any claims that were barred in the Commission proceeding. Although we realize that efficiency is served by consolidating all claims arising out of one transaction and resolving them in one decision, permitting consideration of claims at a later stage could prevent the Commission from fulfilling statutory resolution mandates.

¹²² See Appendix A, § 1.722(d)(2).

¹²³ See *supra* note 107.

¹²⁴ 47 C.F.R. § 1.725 (emphasis added).

71. In addition, we will revise our rules to clarify the applicability of filing fees to both complaints and cross-complaints. While it is clear under our current rules that the \$150 filing fee must be paid in order to file a formal complaint, the rules may be ambiguous as to whether or not the same fee must be paid to file a cross-complaint.¹²⁵ Therefore we will modify our rules to explicitly state that filing fees must be paid by a complainant when filing a formal complaint, as well as by a defendant/cross-complainant when filing a cross-complaint.¹²⁶

J. Replies

72. To further our goals of expediting the processing of complaints and meeting the 1996 Act deadlines, we propose to prohibit replies to answers unless specifically authorized by the Commission. Under current rules, filing a reply is voluntary and failure to reply is not deemed to be an admission of any allegation contained in the answer, except with respect to any facts included in affirmative defenses contained in the answer.¹²⁷ Although replies responding to facts initially alleged by defendants' answers in support of affirmative defenses are necessary to complete the record, our experience has been that, in many instances, replies have been filed which repeat arguments made in the original complaint or which offer information or explanations that should have been presented initially in the complaint. We propose to revise Section 1.726 of the rules to authorize replies only upon a complainant's motion showing that there is good cause to reply to affirmative defenses that are supported by factual allegations that are different from any denials also contained in the answer.¹²⁸ Limiting a complainant's opportunity to file a reply to such circumstances should expedite resolution of complaints without threatening either the development of a complete record or a complainant's ability to plead a case. If replies are thus limited, the complainant will have an increased incentive to produce a complaint that reflects the nature and facts of a controversy completely and accurately. We also

¹²⁵ 47 C.F.R. § 1.735 states that:

the complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with subpart G of this part. See 47 C.F.R. 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, complainant shall pay separate fee and supply three additional copies of the complaint for each additional defendant.

47 C.F.R. § 1.735.

47 C.F.R. § 1.1105(1)(c) states that the filing fee for "Formal Complaints and Pole Attachment Complaints" is \$150.

¹²⁶ See Appendix A, §§ 1.735(b), 1.1105(1)(c).

¹²⁷ 47 C.F.R. § 1.726

¹²⁸ See Appendix A, § 1.726.

propose to provide that when no reply is filed to an answer, the Commission will deem any affirmative defenses to be denied by the complainant.¹²⁹

73. We also propose to prohibit replies to oppositions to motions. Such replies seldom aid the Commission in resolving factual or legal issues and are often used to repeat information already contained within the original motion itself. We seek comment on these and any other alternative proposals.

K. Motions

74. Our goals in modifying the current rules regarding motions¹³⁰ are to eliminate unnecessary pleadings that merely delay final resolution, while ensuring that parties have full opportunity to develop their cases and to expedite generally the processing of complaints.

75. In cases where discovery is conducted, we propose to require parties filing Motions to Compel to certify that they have made a good faith attempt to resolve the matter before filing the motion.¹³¹ This comports with both the Federal Rules of Civil Procedure¹³² and with the rocket docket rules in the Eastern District of Virginia.¹³³ This would limit Commission involvement in conflicts that should be easily resolved.

76. We also propose to eliminate motions to make the complaint "definite and certain."¹³⁴ Under our proposed rules, complaints will have to be very definite and certain to avoid being dismissed.

77. While filing of oppositions to motions will remain permissive, we propose to make failure to file an opposition to a motion possible grounds for granting the motion.¹³⁵ We further propose to shorten the deadline for filing oppositions to motions from ten to five business days.¹³⁶

¹²⁹ See Appendix A, § 1.726. See also Fed. R. Civ. P. 8(d).

¹³⁰ See 47 C.F.R. § 1.727.

¹³¹ See Appendix A, § 1.729(f).

¹³² See Fed. R. Civ. P. 37(a)(2)(A).

¹³³ See, E.D.Va. R. 11.

¹³⁴ See Appendix A, § 1.727(b).

¹³⁵ See Appendix A, § 1.727(e).

¹³⁶ Id.

78. Finally, we propose to prohibit amendment of complaints except for changes necessary under 47 C.F.R. § 1.720(g), which requires that information and supporting authority be current and updated as necessary in a timely manner.¹³⁷ The purpose of this change is to require the complainant to ensure that the complaint is fully developed prior to filing. The complainant would be prevented from introducing new issues late in the development of the case. We seek comment on these and any other alternative proposals.

L. Confidential or Proprietary Information and Materials

79. In revising our formal complaint rules in 1993, we added rules designed to facilitate the exchange and filing of documents claimed by complainants and defendants to be proprietary or confidential. We found that disputes over the exchange of information believed to be proprietary or confidential resulted in lengthy delays in the formal complaint process. Generally, Section 1.731 requires the party asserting confidentiality of any materials that are subject to a discovery request to mark clearly the relevant portions as being proprietary information.¹³⁸ If the proprietary designation is challenged, that party bears the burden of demonstrating, by a preponderance of the evidence, that the material falls under the standards for nondisclosure enunciated in the Freedom of Information Act.¹³⁹ We propose to revise our rules to allow parties to designate as proprietary any materials generated in the course of a formal complaint, and not limit such designation to materials produced in response to discovery.¹⁴⁰ We seek comment on whether additional procedures are needed in light of the short complaint resolution deadlines in the 1996 Act and our proposals in this Complaint NPRM to eliminate certain pleading and discovery opportunities.

M. Other Required Submissions

80. We propose to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed.¹⁴¹ We note that the "rocket docket" rules in the Eastern District of Virginia contain a similar requirement.¹⁴² We believe that requiring the parties to submit a joint statement of stipulated facts and legal issues at this stage would promote agreement on a significant number of the disputed facts and legal issues. Of equal importance is the statement's use as a guide for the Commission to determine whether discovery is necessary

¹³⁷ See Appendix A, § 1.727(h).

¹³⁸ 47 C.F.R. § 1.731(a).

¹³⁹ Id.

¹⁴⁰ See Appendix A, § 1.731(a).

¹⁴¹ See Appendix A, § 1.732(a).

¹⁴² E.D.Va. R. 13 requires that, prior to the pre-trial conference, counsel meet to exchange witness and exhibit lists and to create written stipulations of all uncontested facts to be submitted at the pre-trial conference.

or whether discovery should be limited in a particular case. The statement would serve to highlight to the Commission exactly which factual and legal areas are in dispute. Meeting statutory deadlines of 90 and 120-days necessitates that decisions on discovery and scheduling be made as early as possible.

81. We also seek comment on our current briefing process. First, we seek comment on prohibiting the filing of briefs in cases in which discovery is not conducted. If we were to adopt this option, we would require parties to include proposed findings of fact, conclusions of law and legal analysis with their complaints and answers. Such a requirement would expedite the proceeding and would make briefs redundant. We seek comment, however, on whether parties can reasonably prepare proposed findings of fact, conclusions of law and legal analysis before reviewing the response to their pleadings and the set of stipulated facts. We therefore seek comment on whether retention of the briefing process expedites resolving formal complaints. Second, we seek comment on continuing to allow parties to file briefs, but permitting the Commission staff to limit the scope of such briefs. We have proposed to require initial pleadings to contain comprehensive factual and legal information. Such pleadings should enable the Commission to determine the exact issues requiring briefing so that the brief can focus on the relevant issues and facts that are of decisional significance and thus benefit the Commission staff in analyzing and resolving those issues. This option would add some delay to the process but would enable the parties to review both sides of the case before briefing their legal arguments to the Commission.

82. We seek comment on the appropriate timetables for the submission of any briefs and reply briefs in formal complaint cases. Section 1.732(b) of our current rules provides that "in cases where there is no discovery, briefs shall be filed concurrently by the complainant and defendant within 90 days from the date a complaint is served."¹⁴³ Section 1.1732(c) states that "in cases when discovery is conducted, briefs shall be filed ... at such time designated by the staff, typically 30 days after discovery is completed."¹⁴⁴ Given the time constraints imposed by the 1996 Act, shorter briefing schedules will be necessary to satisfy these statutory requirements. We seek comment on whether (if briefing continues to be permitted) we should allow the staff to set the timetable for completion of any briefs to give the staff maximum flexibility and control in order to meet the various statutory deadlines for resolution. For example, would this proposal provide parties sufficient certainty as to the briefing process or would the application of standard briefing deadlines to all formal complaint cases be more beneficial to parties and the Commission? Parties are encouraged to comment on this and other questions bearing on timetables for the submission of briefs. Parties should also identify reasonable timetables that they believe would be fair to complainants and defendants and which would enable the Commission to satisfy the statutory resolution deadlines in all cases.

¹⁴³ 47 C.F.R. § 1.732(b).

¹⁴⁴ 47 C.F.R. § 1.732(c)

83. We also propose to limit initial briefs to 25 pages and reply briefs to 10 pages in all cases.¹⁴⁵ We seek comment on this and any alternative proposals that would facilitate the preparation and submission of clear and concise briefs within the time constraints imposed by the 1996 Act.

N. Sanctions

84. In this Complaint NPRM, we have proposed rules designed to facilitate the prompt resolution of formal complaints filed with the Commission. The proposed rules, if adopted, will place greater burdens on complainants and defendants alike to be more diligent in presenting and defending against allegations of misconduct within the meaning of various provisions of the Act. Such diligence must be required and enforced if we are to satisfy the explicit complaint resolution directives contained in the 1996 Act and attain our overall goal of generally improving the formal complaint process to better serve the needs of an increasingly competitive marketplace.

85. We ask interested parties to consider carefully the goals and policies underlying the rules of practice and procedure proposed in this Complaint NPRM and comment on what sanctions and/or remedies would be necessary or appropriate to ensure full compliance with and satisfaction of our proposed rule requirements. In this regard, we note that we issued a Public Notice generally advising of our resolve to impose sanctions on parties who file frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the Commission or its staff.¹⁴⁶ In the context of a formal complaint proceeding, parties should comment on the types of sanctions that should be assessed against a complainant or defendant that fails to address or satisfy the explicit requirements under our rules. For example, we envision that a complainant's failure to satisfy the form and content requirements under our rules could result in the summary dismissal of the complaint by our staff. Similarly, a defendant's failure to respond fully and with specificity to a complainant's allegations could result in a summary ruling or other judgment in favor of the complainant. In other instances, the failure to file pleadings in accordance with our rules could, especially if repeated, warrant the imposition of monetary fines under the Act's forfeiture provisions.¹⁴⁷ These are just several examples of sanctions and remedies at our disposal

¹⁴⁵ See Appendix A § 1.732(b) - (c).

¹⁴⁶ Commission Taking Tough Measures Against Frivolous Pleadings, 11 FCC Rcd 3030 (1996).

¹⁴⁷ 47 U.S.C. § 503(b)(1) states in part that:

Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--

....
(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;
....

and we encourage parties to comment on these and other alternatives that might help to ensure full compliance with the expedited complaint procedures proposed in this Complaint NPRM.

O. Other Matters

86. Finally, we seek comment on a matter presented by certain language in Section 271 relative to other complaint provisions in the Act. First, Section 271 states that the Commission shall "act on" certain complaints within 90 days.¹⁴⁸ It does not state that the Commission's action with respect to complaints alleging a violation of Section 271(d) must be "final" as is the case with certain other complaint provisions added by the 1996 Act.¹⁴⁹ For example, Section 260 requires that a "final determination" regarding complaints involving material financial harm to providers of telemessaging services be made within 120 days of filing and Section 275 requires that a "final determination" regarding complaints involving material financial harm to providers of alarm monitoring services be made within 120 days of filing. We tentatively conclude that "act on" as used in Section 271(d)(6)(B) encompasses, where appropriate, determinations by the Bureau whether a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services and the imposition of any applicable section 271(d)(6)(A) sanction,¹⁵⁰ and need not necessarily be final action by the full Commission. We seek comment on this tentative conclusion.

87. Second, we also note that the 90-day complaint resolution deadline for Section 271(d) complaints applies only in the absence of an agreement otherwise by the parties to the complaint action.¹⁵¹ We seek comment on the appropriate procedure or mechanism for early notice to the Commission of the parties' agreement to extend or waive the 90-day resolution deadline. Given the new form and content requirements and expedited procedures we propose in this rulemaking proceeding, we expect that parties, at a minimum, will reach any such agreement and so notify the staff very early in the complaint process. For example, once the staff

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act.

¹⁴⁸ 47 U.S.C. § 271(d)(6)(B).

¹⁴⁹ Id.

¹⁵⁰ See 47 U.S.C. § 271 (d)(6)(B); BOC In-Region NPRM, para. 97.

¹⁵¹ Section 271(d)(6)(B) states that:

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). *Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.*

47 U.S.C. § 271(d)(6)(B), emphasis added.

and the parties have established a sufficient record upon which to base a decision on a Section 271(d) complaint, we see no benefit to delaying or postponing a decision in the matter. We ask parties to comment on specific procedures and timetables that could be employed to ensure early notification to the Commission of waivers or extension agreements under Section 271(d)(6)(B) and to avoid the unnecessary expenditure of time and resources by the staff and parties to such a complaint action.

IV. CONCLUSION

88. In this Complaint NPRM, we propose to amend our rules governing the filing of formal complaints to implement certain complaint provisions in the 1996 Act and establish procedures necessary to facilitate the full and fair resolution of complaints filed under such provisions within the deadlines established by the Telecommunications Act of 1996. We tentatively conclude that the pro-competitive goals and policies underlying the complaint resolution deadlines in the 1996 Act would be enhanced by applying the rules proposed in this Complaint NPRM to all formal complaints, not just those enumerated in the 1996 Act. Applying standard procedures to all formal complaints will result in consistent and uniform Commission rules, which will facilitate the filing of complaints by complainants and defendant carriers. Our overall goal is to establish rules of practice and procedure which, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by telecommunications carriers, will foster robust competition in all telecommunications markets. This proceeding is one of a series of interrelated rulemakings designed to implement the mandates of the 1996 Act by promoting competition and reducing regulation in the telecommunications market, while simultaneously advancing and preserving universal service for all Americans. The proposals made and tentative conclusions reached in this Complaint NPRM should be reviewed in conjunction with the enforcement goals and policies addressed in those related rulemaking proceedings.

V. PROCEDURAL MATTERS

A. Ex Parte Rules - Non-restricted Proceeding

89. This is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

B. Paperwork Reduction Act Analysis

90. This Complaint NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Complaint NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same

time as other comments on this Complaint NPRM; OMB comments are due 60 days from the date of publication of this Complaint NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

91. Written comments by the public on the proposed and/or modified information collections are due January 6, 1997. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

C. Initial Regulatory Flexibility Analysis

92. As required by Section 603 of the Regulatory Flexibility Act,¹⁵² the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in the Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers - Notice of Proposed Rulemaking ("Complaint NPRM"). Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the same deadlines for comments on the Complaint NPRM.

93. Need for and Objectives of the Proposed Rules: The Commission is issuing this Complaint NPRM to implement certain complaint provisions contained in the Telecommunications Act of 1996 and to improve generally the speed and effectiveness of our formal complaint process.

94. Legal Basis: The Complaint NPRM is adopted pursuant to Sections 1, 4(i), 4(j), 207 - 209, 260, 271, 274, and 275 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 207 - 209, 260, 271, 274, 275.

95. Description and Number of Small Entities Which May be Affected: The proposals in this proceeding may have a significant impact on a substantial number of small businesses as

¹⁵² 5 U.S.C. § 603.

defined by Section 601(3) of the Regulatory Flexibility Act. Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).¹⁵³ SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) as those which have fewer than 1,500 employees.¹⁵⁴

1. Telephone Companies (SIC 481)

96. Estimate of Potential Complainants that may be Classified as Small Businesses. Section 208(a) provides that formal complaints against a common carrier may be filed by "[a]ny person, any body politic or municipal organization."¹⁵⁵ The FCC has no control as to the filing frequency of complaints, nor as to the parties that will file complaints. The filing of complaints depends entirely upon the complainant's perception that it possesses a cause of action against a common carrier subject to the Communications Act of 1934, as amended, and it is the complainant's decision to file its complaint with the FCC. Therefore we are unable at this time to estimate the number of future complainants that would qualify as small business concerns under SBA's definition.

97. Estimate of Potential Defendants that may be Classified as Small Businesses. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.¹⁵⁶ This number encompasses a broad category which contains a variety of different subsets of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."¹⁵⁷ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be

¹⁵³ 15 U.S.C. § 632. See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc., 176 B.R. 82 (N.D. Ga. 1994).

¹⁵⁴ 13 C.F.R. § 121.201.

¹⁵⁵ 47 U.S.C. § 208(a).

¹⁵⁶ United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

¹⁵⁷ 15 U.S.C. § 632(a)(1).

affected by this Order. We seek comment on this conclusion. We estimate below the potential defendants affected by this order by service category. We seek comment on these estimates.

98. Wireline Carriers and Service Providers. SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.¹⁵⁸ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

99. Local Exchange Carriers. Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.¹⁵⁹ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Order.

100. Interexchange Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies

¹⁵⁸ 1992 Census, supra, at Firm Size 1-123.

¹⁵⁹ Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (TRS Worksheet).

reported that they were engaged in the provision of interexchange services.¹⁶⁰ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXC's that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXC's that may be affected by the decisions and rules adopted in this Order.

101. Competitive Access Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services.¹⁶¹ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 30 small entity CAPs that may be affected by the decisions and rules adopted in this Order.

102. Operator Service Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 29 companies reported that they were engaged in the provision of operator services.¹⁶² Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 29 small entity operator service providers that may be affected by the decisions and rules adopted in this Order.

103. Pay Telephone Operators. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

we collect annually in connection with the TRS. According to our most recent data, 197 companies reported that they were engaged in the provision of pay telephone services.¹⁶³ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 197 small entity pay telephone operators that may be affected by the decisions and rules adopted in this Order.

104. Wireless (Radiotelephone) Carriers. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.¹⁶⁴ According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.¹⁶⁵ The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

105. Cellular Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 789 companies reported that they were engaged in the provision of cellular services.¹⁶⁶ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers that may be affected by the decisions and rules adopted in this Order.

¹⁶³ Id.

¹⁶⁴ 1992 Census, at Firm Size 1-123.

¹⁶⁵ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

¹⁶⁶ Id.

106. Mobile Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 117 companies reported that they were engaged in the provision of mobile services.¹⁶⁷ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers that may be affected by the decisions and rules adopted in this Order.

107. Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than \$40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.¹⁶⁸ The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

108. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Of the 153 qualified bidders for the D, E, and F Block PCS auctions, 105 were small businesses.¹⁶⁹ Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than \$125 million.¹⁷⁰ There are 114

¹⁶⁷ Id.

¹⁶⁸ See Implementation of Section 309(i) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

¹⁶⁹ See Auction of Broadband Personal Communications Service (D, E, and F Blocks), Public Notice, DA 96-1400 (rel. Aug. 20, 1996).

¹⁷⁰ Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order, GN Docket No. 90-314, FCC 96-278 (rel. June 24, 1996).

eligible bidders for the F Block.¹⁷¹ We cannot estimate, however, the number of these licenses that will be won by small entities under our definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees¹⁷² and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume for purposes of this IRFA, that all of the licenses in the D, E, and F Block Broadband PCS auctions may be awarded to small entities under our rules, which may be affected by the decisions and rules adopted in this Order.

109. SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.¹⁷³ The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. We assume, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this Order.

110. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be

¹⁷¹ See Auction of Broadband Personal Communications Service (D, E, and F Blocks), Public Notice, DA 96-1400 (rel. Aug. 20, 1996).

¹⁷² 1992 Census, Table 5, Employment Size of Firms: 1992, SIC Code 4812.

¹⁷³ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

made, we assume, for purposes of this IRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this Order.

111. Resellers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 206 companies reported that they were engaged in the resale of telephone services.¹⁷⁴ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 206 small entity resellers that may be affected by the decisions and rules adopted in this Order.

2. Cable System Operators (SIC 4841)

112. Cable Systems: SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992.¹⁷⁵

113. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.¹⁷⁶ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.¹⁷⁷ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439

¹⁷⁴ Id.

¹⁷⁵ 1992 Census, supra, at Firm Size 1-123.

¹⁷⁶ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

¹⁷⁷ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

114. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁷⁸ The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.¹⁷⁹ Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.¹⁸⁰ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

115. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements: Section 1.721 of the proposed rules would require all complainants to complete and submit a Formal Complaint Intake Form with their complaints.¹⁸¹ The intake form requirement is designed to help complainants avoid procedural and substantive defects that might affect the staff's ability to quickly process complaints and delay full responses by defendant carriers to otherwise legitimate complaints. In addition, the completed form should enable the staff and the defendant carriers to quickly identify the specific statutory provisions under which relief is being sought in the complaint. Because the proposed form would solicit information that would be already contained in the body of the formal complaint, no additional professional skills would be necessary to complete the form.

116. Potential Impact: Some of the proposed requirements in this Complaint NPRM may have a significant economic impact on small business entities. Generally, this Complaint NPRM proposes to require or encourage complainants and defendants to engage in certain pre-filing activities, change service requirements, modify the form of initial pleadings, shorten filing deadlines, eliminate certain pleading opportunities that do not appear useful or necessary, and modify the discovery process.

¹⁷⁸ 47 U.S.C. § 543(m)(2).

¹⁷⁹ 47 C.F.R. § 76.1403(b).

¹⁸⁰ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹⁸¹ See Appendix A, Section 1.721(a)(12); Appendix B.

117. Pre-Filing Activities and Discovery: The Commission proposes to require a complainant to do the following: certify that it discussed the possibility of settlement with the defendant carrier's representative(s) prior to filing the complaint and attach certain written documentation.¹⁸² The Commission seeks comment on limiting discovery.¹⁸³ The Commission also seeks comment on the feasibility of allowing the parties to a complaint proceeding to agree among themselves to a cost-recovery system as a basis for facilitating the prompt identification and exchange of information. While these proposed rules may place a greater burden on a small business entity to provide better legal and factual support early in the process, we tentatively conclude that it does not significantly alter the level of evidentiary and legal support that would be ultimately required of parties in formal complaint actions pursuant to the current rules. It may, however, make it more difficult for all complainants, including small business, to gather the information needed to prevail on their complaints. Potentially higher initial costs may be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements. It has been noted, for example, that the overall litigation costs of "rocket docket"¹⁸⁴ cases in the U.S. District Court for the Eastern District of Virginia are lower than the costs of cases that take longer to resolve.¹⁸⁵ Indeed, by requiring better and more complete submissions earlier in the process, this proposed rule reduces the need for discovery and other information filings, thereby significantly reducing the burden on small business entities. We seek comment on this tentative conclusion and any other potential impact of these proposals on small business entities.

118. Format and Content Requirements and Other Required Submissions: The Commission proposes to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed.¹⁸⁶ The Commission also proposes to require all pleadings that seek Commission orders, as well as the orders themselves, to contain proposed findings of fact and conclusions of law, with supporting legal analysis,¹⁸⁷ and to require these submissions to be in both hard copy and on computer disks in "read only" mode and formatted in WordPerfect 5.1 for Windows,¹⁸⁸ or as otherwise directed by the staff in particular cases. The Commission also proposes to require the complaint, answer, and any authorized reply to include: (1) the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged in the pleadings, identifying the subjects of

¹⁸² See Appendix A, § 1.721(a)(9).

¹⁸³ See *supra* section on "Discovery."

¹⁸⁴ See *supra* note 54.

¹⁸⁵ See *supra* note 82.

¹⁸⁶ See Appendix A, § 1.732(a).

¹⁸⁷ See Appendix A, § 1.727(g).

¹⁸⁸ See Appendix A, § 1.734(d).